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No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE NEZ PERCE TRIBE OF INDIANS AND WILLARD N. STEVENS, PETITIONERS

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–2a) is reported at 257 F. 2d 206. The District Court did not write an opinion. Its views are set forth in its ruling reprinted at Pet. App. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1958. A timely petition for rehearing was denied on September 5, 1958 (Pet. App. 2a). The petition for a writ of certiorari was filed on December 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the legal title to property is in the United States and it has a substantial claim to full ownership, it is an indispensable party to a suit against the Secretary of the Interior seeking to determine and adjudicate rights therein.

STATUTES INVOLVED

1. Pertinent parts of the Act of August 15, 1894, 28 Stat. 286, 326, which ratified an agreement of May 1, 1893, between the Nez Perce Indians and the United States, are as follows:

> ARTICLE I
>
> The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz: [Here follows a description of 32,020 acres of tribal land] [28 Stat. at p. 327].
>
> * * * * *
>
> ARTICLE III
>
> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars * * * [28 Stat. at p. 329].

2. The Act of June 4, 1953, 67 Stat. 41, 25 U.S.C. Supp. 293a, upon which petitioners rely, provides in full as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior, or his authorized representative, is hereby authorized to convey to State or local governmental agencies or to local school authorities all the right, title, and interests of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such purposes: *Provided,* That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian tribe: *Provided further,* That no more than twenty acres of land shall be transferred under the terms of this Act in connection with any single school property conveyed to State or local governmental agencies or to local school authorities. Any conveyance under this Act shall reserve all mineral deposits in the land and the right to prospect for and remove such deposits under rules and regulations prescribed by the Secretary of the Interior, shall require the property to be used for school or other public purposes, and shall require the property to be available to Indians and non-Indians on the same terms unless otherwise approved by the Secretary of the Interior. If at any time the

> Secretary of the Interior determines that the grantee of any such lands, improvements, and personal property has failed to observe the provisions of the transfer agreement and that the failure has continued for at least one year, he may declare a forfeiture of the conveyance and the title conveyed shall thereupon revert to the United States. Such determination by the Secretary of the Interior shall be final.

STATEMENT

The complaint in this suit against the Secretary of the Interior involves some 1,700 acres of land in the State of Idaho, but the litigation was directly precipitated by the execution of a deed to 19 of these acres by the Commissioner of Indian Affairs to the Lapwai School District No. 341 in Idaho. The complaint sought an injunction against delivery of the deed to the 19 acres, and also an injunction against interference with use by the petitioners of the remainder of the 1,700 acres.

The land is all part of what is known as the "Agency Reserve" of the Nez Perce Indian Reservation. It is unquestioned that these lands were reserved for the Nez Perce Indians up to May 1, 1893. On that day, an agreement was entered into by the United States and the Nez Perce Indians, which was ratified by the Act of August 15, 1894, 28 Stat. 286, 326, Article I of which provided in part as follows (*supra*, p. 2).

> The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to

> all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz: * * *

Article I continues with a description of the lands "retained" and not ceded to the United States. That description embraces 32,020 acres of tribal land, but it does not include among the excepted lands the Agency Reserve land involved in the instant litigation. Under Article III of the agreement, in consideration for the lands thereby conveyed, the United States "stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars * * *". 28 Stat. at 329 (*supra*, p. 2).

Pursuant to the terms of the Agreement of May 1, 1893, the President directed allotments to be made to the individual Nez Perce Indians entitled thereto under the terms of the General Allotment Act of February 8, 1887, 24 Stat. 388; and on May 4, 1889, the Acting Commissioner of Indian Affairs directed Miss Alice C. Fletcher to make those allotments and to submit schedules of the lands allotted.

As set out in the answer and the respondent's motion for summary judgment (Jt. App. 6–7, 13), the allotting agent was also instructed to prepare a schedule showing lands occupied by any religious society or organization for religious or educational work among the Indians and "You will also note upon this schedule all tracts occupied for Agency and school purposes." The schedule so submitted included the 19 acres of land proposed to be conveyed to the Lapwai

School District under the Act of June 4, 1953, *supra*, pp. 3–4, and this schedule, together with the schedule of land set apart for graveyards, was approved by the then Secretary of the Interior on March 19, 1895, and the Commissioner of the General Land Office was directed to "cause the same to be noted on the books of his office." (Jt. App. 7.)

In these circumstances the Solicitor of the Department of the Interior ruled that full title to and ownership of the Nez Perce Agency Reserve is solely in the United States and that the proposed transfer of the 19-acre tract in question could be made without tribal consent under the Act of June 4, 1953.[1] Counsel for petitioners took the position that the 1893 Agreement, as ratified by the Act of August 15, 1894, 28 Stat. 286, 326, contemplated that the lands in Agency Reserve status were by implication to be excepted from the cession and remain in tribal ownership; and, accordingly, they sought to have the Solicitor of the Department of the Interior reconsider his decision that the consent of the Tribe was unnecessary (Jt. App. 3). The Solicitor declined to do so and counsel for petitioners was thereafter advised that the deed to the school district had been mailed to the Area Director, Bureau of Indian Affairs, Portland, Oregon, for delivery to the school district.[2]

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[1] The 1953 Act requires that "the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian Tribe."

[2] The deed was later returned to Washington pending the outcome of this litigation. See *infra*, pp. 12–16, for later developments.

On December 16, 1955, the petitioners filed the instant suit in which they prayed that the Secretary of the Interior be restrained and enjoined *pendente lite* from conveying the 19 acres of land without the consent of the Nez Perce Tribe; that it be declared and adjudged that the 1,700 acres of land described in the complaint "is the property of the Nez Perce Tribe and is held by the United States in trust for the Nez Perce Tribe"; and that the respondent "be directed to give possession to the plaintiff Tribe of all lands set aside for school, cemetery and agency purposes" (Jt. App. 3).

Upon cross-motion for summary judgment, the District Court ruled (Jt. App. 15):

> The Court is of the opinion that this is in effect an action against the United States. It seeks to enjoin the Secretary of the Interior from conveying certain lands to which the record title is in the United States and of which the United States claims to have full ownership. It is in effect an action to enjoin the United States from conveying property which it claims to own, in which the plaintiffs claim certain rights, the existence of which the United States denies.
>
> Obviously, the United States is an indispensable party because its rights would be determined and adjudicated. It has not consented to be sued in a case such as this. Under the circumstances the Court will grant the defendant's motion for summary judgment on the ground that the suit is in effect a suit against the United States, and the United States has not consented to be sued.

An appropriate judgment was thereafter entered which granted the respondent's motion for summary judgment, denied petitioners' motion, and dismissed the complaint (Jt. App. 15–16).

The Court of Appeals affirmed *per curiam*, stating (Pet. App. 1a): "The United States claims full ownership. The question is highly debatable. Because we think it cannot be decided in a suit in which the United States is not a party, we do not reach it."

ARGUMENT

1. This is a suit to establish rights in land to which the United States has conceded legal title, and over which it has been exercising dominion. Petitioners admitted below, and implicitly acknowledge here (Pet. 8), that the legal title is plainly in the United States, and the most they can claim is a beneficial interest resulting from an alleged contract with the Government. By the Agreement of 1893 (*supra*, p. 2), the Nez Perce Indians relinquished all claim and ceded to the United States all interests in a defined tract of land which, as described, includes the lands involved in this suit; certain lands were expressly excluded from the cession, but they did not include the now disputed area (*supra*, p. 5). The claim advanced in this litigation is that *by implication* the Tribe intended also to reserve a beneficial interest in the lands in question. The Government, on the other hand, denies that any such implied additional exception was created in 1893 and 1894.[3] On

[3] Under well-established rules of construction, where all lands except such as are specifically reserved are conveyed, it is not to be presumed that lands not so listed for exception from the grant were to be reserved.

the face of this controversy, the position of the United States that it has full ownership is, at the very least, a substantial one, as the court below explicitly recognized when it declared that "the question [on the merits] is highly debatable" (Pet. App. 1a).

(*a*). In these circumstances, this Court has recognized and held for well over a century that the sovereign is an indispensable party to any such suit to adjudicate rights in the property. From *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, to *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226, the Court has been of the view that actions to determine interests in, or title to, property in which the Government has a substantial claim are necessarily suits against the sovereign—particularly where, as here, the Government has an admitted interest in, and possession of, the property.[*] In *Louisiana* v. *Garfield*, 211 U.S. 70, involving a claim by the State against the Secretary of the Interior to establish its title to cer-

[*] *Governor of Georgia* v. *Madrazo*, 1 Pet. 110; *Carr* v. *United States*, 98 U.S. 433, 437–438; *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 457; *Christian* v. *Atlantic & N.C. R.R. Co.*, 133 U.S. 233; *Belknap* v. *Schild*, 161 U.S. 10; *Stanley* v. *Schwalby*, 162 U.S. 255, 270, 272; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386–387; *Oregon* v. *Hitchcock*, 202 U.S. 60, 69–70; *Naganab* v. *Hitchcock*, 202 U.S. 473, 475–476; *Louisiana* v. *Garfield*, 211 U.S. 70, 77–78; *Hopkins* v. *Clemson College*, 221 U.S. 636, 648–649; *Goldberg* v. *Daniels*, 231 U.S. 218; *Lankford* v. *Platte Iron Works*, 235 U.S. 461; *New Mexico* v. *Lane*, 243 U.S. 52, 58; *Morrison* v. *Work*, 266 U.S. 481, 485–486; *Leather* v. *White*, 266 U.S. 592, affirming 296 Fed. 477 (C.A. 7); *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 118; *Minnesota* v. *United States*, 305 U.S. 382, 386; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691, 703–705; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226.

tain lands, Mr. Justice Holmes, for the Court, first assumed "for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit" (211 U.S. at 75). He then briefly reviewed the state's argument that it had good title, stated that at least the case was doubtful, and concluded (211 U.S. at 77):

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.

See also, *e.g.*, *New Mexico* v. *Lane*, 243 U.S. 52, 58; *Minnesota* v. *United States*, 305 U.S. 382, 386 (applying this principle to Indian lands in which the United States owns the fee); *Morrison* v. *Work*, 266 U.S. 481, 485.[8]

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[8] *Morrison* v. *Work*, *supra*, presented a case very similar in nature to the instant one. There, Morrison, a Chippewa Indian, filed suit to enjoin the Secretary of the Interior from carrying out various acts of Congress. A motion to dismiss was filed which set up "lack of jurisdiction of the court over the subject matter; lack of necessary parties plaintiff and defendant; and lack of merits." 266 U.S. at 484–485. The trial court sustained the motion to dismiss and the Court of Appeals affirmed. In affirming the judgments below, this Court noted (266 U.S. at pp. 485–486): "The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued * * *." (citations in footnotes omitted)

(*b*). Petitioners seek to avoid these repeated rulings by mistakenly relying on the doctrine of *United States* v. *Lee*, 106 U.S. 196, that a government official tortiously acting beyond his authority to occupy or seize wholly private property may be dispossessed in a personal suit. But as shown above the United States has an admitted interest in the land in question; in no event does the Tribe have or claim full ownership as if the land were private.* In addition, petitioners' prayer for relief (Jt. App. 3)—which in the petition for rehearing below they stressed had not been abandoned (R. 22)—seeks to have an affirmative directive issued to the Secretary requiring him to cease dealing with the land and to transfer to the Tribe full possession.

Such a case is clearly governed by the rule that we have set forth above, *supra*, pp. 9-10;—an action must fail, "as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property". *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691, fn. 11. In his dissent in *Larson*, Mr. Justice Frankfurter expressly agreed with this principle (337 U.S. at 712):

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* Contrary to petitioners' derogation of the importance of the Government's legal title to Indian lands, that title is strong enough to support actions by the United States to protect such lands. See the Brief for the United States In Opposition, *Barta, et al.* v. *Oglala Sioux Tribe*, No. 548, this Term, certiorari denied, January 12, 1959.

> The governing principle is clear enough. If a defendant is asked to transfer the possession or title to property which is the Government's, judged by the conventional tests of possession or ownership, or if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever *pro tanto* the impersonal government, such demands are effectively demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies.

What petitioners ask here is plainly that the Secretary be required "to transfer the possession" of "property which is the Government's, judged by the conventional tests of possession or ownership." In this type of case, there is no judicial disagreement that the suit is against the Government.

2. For these reasons, we believe that the decision below—that this is an unconsented suit against the United States—is clearly correct. But the Court of Appeals went on to indicate that in its view the question on the merits was "highly debatable". In the light of this characterization of the problem, the Department of the Interior has determined that the issue on the merits should be promptly laid to rest, before the proposed conveyance to the Lapwai School District is completed. In a recent letter dated February 27, 1959 (set forth in the Appendix, *infra*, pp. 14–16), petitioners' counsel was formally advised of this administrative determination and of the means by which a judicial ruling on the merits of the controversy can be obtained. Either a suit in the Court of Claims by

petitioners or a suit by the United States to quiet title would be appropriate.

Accordingly, it is now clear that a judicial decision on the merits of the dispute between petitioners and the United States will be had in the Court of Claims or in the District Court for Idaho. Petitioners are no longer in any need of the injunctive relief they seek against the Secretary, and the jurisdictional problem presented by the petition has no further importance in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
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MARCH 1959.

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

WASHINGTON 25, D.C.,
February 27, 1959.

DEAR MR. SCHIFTER: As you know, the Department of the Interior has ruled that title to the so-called Nez Perce Agency Reserve is solely in the United States by virtue of the Agreement of May 1, 1893, ratified by the Act of August 15, 1894, 28 Stat. 286, 326. It was on the basis of that ruling that the Government proposed to convey some 19 acres of that land to the Lapwai School District. Thereupon, as counsel for the Nez Perce Tribe, you instituted an action in the United States District Court for the District of Columbia to enjoin the Secretary from delivering a deed to these 19 acres, and also to enjoin him from interfering with the Tribe's use of other lands (some 1,700 acres) which constitute the balance of the so-called Reserve.

The District Court dismissed the complaint on the ground that the suit was in substance one against the United States to which the United States was not a party and to which it had not consented. The Court of Appeals affirmed on the same ground, but expressed the view that the question on the merits, *i.e.*, whether the United States has "full ownership," was "highly debatable." The Tribe's petition for a writ of certiorari is now pending before the Supreme Court.

In view of the Court of Appeals' expression as to the debatable character of the issue on the merits and in view of the further fact that there does not now appear to be an urgent need which would require a prompt conveyance to the School District, the Secretary has concluded that, regardless of the final outcome of your present suit for injunctive relief, the proposed conveyance will not be made without first laying to rest the issue on the merits. You have been previously advised that this was the direction of our thinking and I write to you at this time in order to confirm our administrative position. This does not, of course, imply any change in our view that title to the property in question was unqualifiedly ceded to the United States by Agreement of May 1, 1893.

There are at least two avenues by which the issue on the merits might be judicially determined. As you are aware, the United States, over a substantial period of years, has leased some portions of the 1700-odd acres and has received rentals therefrom. You have indicated that you are contemplating a suit in the Court of Claims on the theory that the Tribe is entitled to these rental proceeds. Such a suit would necessarily bring into issue the Tribe's claim of a beneficial interest in the property and thus lead to a definitive resolution of the controversy.

For its part, the United States could institute suit to quiet title preliminary to making its proposed conveyance to the School District. We are prepared to follow that alternative course.

We have discussed this entire matter with the Office of the Solicitor General, and it is the Government's intention to advise the Supreme Court, before which the Tribe's petition for a writ of certiorari is pend-

ing, of this Department's administrative position as set forth above.

Sincerely yours,

ROGER ERNST,
Assistant Secretary of the Interior.

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